

left the Village and other affected communities seriously doubting Millennium's "no impact" assertions and wondering, "what else is there about this pipeline that we don't know about yet?"

In this Brief, the Village writes in support of the NYSDOS and argues that the Secretary should uphold the NYSDOS Objection because:

- the objection was timely and proper in all respects;
- the proposed pipeline is not "consistent with objectives or purposes of the [CZMA]" ("Ground I");¹⁸ and
the pipeline is not "necessary in the interest of national security" ("Ground II").¹⁹

In particular, the Village emphasizes, and provides supporting evidence in the exhibits to this Brief, that Millennium has several other reasonable and viable options, some of which would actually be shorter in length and cost *less* than the current proposed route.²⁰ All of these alternatives would serve the project's purposes without having to blast and dredge across one of the most important aquatic habitats in the entire Hudson River estuary. As such, upholding the NYSDOS Objection will effect the proper balancing of competing national interests mandated under the CZMA.

II. The NYSDOS Objection Was Timely Because (1) Millennium Agreed To Extend the Review Period And (2) Any Delays Were The Result Of Millennium's Own Actions.

The CZMA regulations allow the Secretary to issue a "procedural override" of a state's consistency objection if the objection was the product of procedural error or otherwise not made

¹⁸ 15 C.F.R. § 930.121 (2002).

¹⁹ 15 C.F.R. § 930.122 (2002).

²⁰ Maps of the Village's proposed alternative routes are appended hereto as Exhibit 1. In addition, a Feasibility Evaluation of Alternatives Routes for the Millennium Pipeline Project, dated October 2002, prepared by O'Brien & Gere Engineers, Inc. ("OBG Alternatives Report") is appended at Exhibit 2.

in compliance with the applicable CZMA requirements.²¹ Millennium raises one such procedural claim in its Initial Brief: Millennium requests the Secretary to “dismiss” the NYSDOS Objection as untimely, stating that “NYSDOS ... waited for 42 months before issuing its decision.”²² The Secretary should reject this claim and find the NYSDOS Objection to have been timely and proper in all respects.

A. Millennium Agreed To Extend The Review Period.

Millennium does not dispute that, on September 12, 2001, it and the NYSDOS mutually agreed to extend the consistency review deadline until sometime after NYSDOS received the FEIS.²³ Millennium states: “Recognizing that the new ‘ConEd Offset’ route would be evaluated by the FERC in the soon-to-be-issued FEIS, Millennium agreed to extend the NYSDOS’ review period until after the FEIS was issued.”²⁴ Millennium argues, however, that it only agreed to extend the review period 60 days after the FERC issued the FEIS. The evidence does not support Millennium’s claim.

Millennium argues that the agreement to extend the review period imposed upon [REDACTED] of 60 days after receipt of the FEIS, and that NYSDOS unilaterally and inappropriately added language to this agreement giving itself the right to further extend the review period in the event of changes to the proposed action.

²¹ 15 C.F.R. § 930.129(b) (2002).

²² Millennium Initial Brief at 9-10. In its Notice of Appeal, Millennium similarly claimed that “NYSDOS received Millennium’s certification on November 20, 1998, and the required notification was furnished on May 9, 2002, or well over three years later.” Millennium Notice of Appeal (June 7, 2002).

²³ *Id.*

²⁴ *Id.* at 14.

First, Millennium’s argument that a hard and fast 60-day “deadline” was part of the extension agreement is contrary to the plain language of the agreement. Millennium’s letter states that “Millennium and the DOS have, pursuant to 15 CFR 930.60(a)(3), mutually agreed to extend the time for the DOS to render a decision. . . . DOS will determine consistency of the referenced project *after issuance of the [FEIS] by [FERC]*.”²⁵ There is no reference to a “60-day deadline” anywhere in the Millennium letter.

Millennium argues, however, that a 60-day deadline should be read into the agreement by virtue of the NYSDOS’ letter in response to Millennium, which states:

The Department of State acknowledges the receipt of your letter ... and agrees to extend the time period for its review. . . . The Department *expects* to complete its consistency review within 30 to 60 days after receipt of the [FEIS] . . . *barring any significant pipeline routing or other project changes that may have effects upon the coastal zone of New York State.*²⁶

Millennium’s argument is wrong. The NYSDOS’ acknowledgement letter indicates that the “30 to 60 days” language was a goal -- not a binding obligation. Had Millennium and NYSDOS agreed that a hard “60-day” deadline would be a binding term of their agreement, it is likely that one of the parties would have clearly stated such in their letters, but neither party did.

Further support for the proposition that there was never an agreement to limit the extension can be found by examining Millennium’s draft proposal to NYSDOS. The draft proposal that Millennium emailed to NYSDOS three days before the date of their final agreement includes the proposed language that NYSDOS will use its “best efforts” to make a

²⁵ Letter from Thomas S. West, LeBoeuf, Lamb, *et al.* (representing Millennium) to William Barton, NYSDOS, at 1 (Sept. 12, 2001) (emphasis added).

²⁶ Letter from William Barton, NYSDOS, to Thomas S. West, LeBoeuf, Lamb, *et al.* (Sept. 12, 2001) (emphasis added).

decision “promptly (30-60 days) following the issuance of the [FEIS].”²⁷ This draft letter provides further evidence that Millennium proposed a flexible “best efforts” deadline, but ultimately agreed to the open-ended timing language that appears in its final letter. In sum, Millennium’s attempts to read into the extension agreement a hard and fast “60-day deadline” is contrary to the plain language of the agreement and not supported by the evidence of the parties’ pre-agreement negotiations on this issue.

Second, Millennium takes issue with the language in the NYSDOS response letter noting that additional time beyond the 30 to 60 day timeframe may be needed in the event of “any significant pipeline routing or other project changes that may have effects upon the coastal zone of New York State.”²⁸ Millennium claims that this language was not part of their agreement, and that it would allow NYSDOS to effect a “unilateral stop” on the consistency timeclock in violation of CZMA regulations.²⁹ However, as described above, the parties’ extension agreement did not contain any mandatory 60-day deadline; therefore, this language does not create a “unilateral stop,” but rather is a reasonable qualification of NYSDOS’ goal of responding within 30 to 60 days.

There is nothing in the CZMA regulations suggesting that flexible or open-ended extensions are invalid. The regulations merely state that, “State agencies and applicants . . . may mutually agree to stay the consistency timeclock or extend the six-month review period.” These provisions, which were promulgated as part of the December 8, 2000 amendments to the CZMA

²⁷ Initial Brief and Supporting Data of the New York Department of State, Exhibit 5 (Oct. 16, 2002) (“NYSDOS Initial Brief”).

²⁸ Letter from William Barton, NYSDOS, to Thomas S. West, LeBoeuf, Lamb, *et al.* (September 12, 2001).

²⁹ Millennium Initial Brief at 16.

regulations,³⁰ do not require mandatory extension “deadlines” and rather were intended to provide States and applicants more flexibility to accommodate changing circumstances (like those present here) and complex regulatory processes. This flexibility works to the benefit of both the state agencies and -- as in this case -- the applicant.

Millennium does not deny that it entered into an agreement to extend the review period. It cannot, however, provide any support for its contention that the parties agreed to limit that extension to 60 days after the FERC issued its FEIS. Thus, the reasonable conclusion is that the NYSDOS should be given the time necessary to thoroughly review the facts of the case. As noted below, however, Millennium’s delays in providing the requisite information delayed NYSDOS’ decision-making process.

B. The Delays Were The Result Of Millennium’s Own Actions.

The equities of this case weigh against an override on the basis of Millennium’s claim that NYSDOS committed procedural error. Indeed, the procedural history of this case was driven by Millennium’s own acts and omissions, including its numerous changes to the proposed project, its refusal to supply consistency evaluations for key aspects of the project, its own *express* agreement to extend the consistency review deadline, and finally, its failure to provide NYSDOS (or any other agency) an evaluation of the impact of blasting on the significant habitat until more than seven months *after* the publication of the FEIS.

The notion that project changes may require additional consistency review is not, as Millennium contends, some new or unilaterally imposed requirement. Millennium agreed to this

³⁰ Coastal Zone Management Act Federal Consistency Regulations, 65 Fed. Reg. 77124 (2000) (“Coastal Zone Management Regulations”).

procedure as part of NYSDOS' agreement to begin the consistency review early.³¹ In a letter dated April 17, 2001, written in response to NYSDOS' April 5, 2001 notice that NYSDOS began its consistency review upon receipt of the SDEIS, Millennium stated

On the basis of the foregoing, Millennium respectfully requests that you proceed with final decision-making concerning the Millennium Project. *Our request for final decision-making is subject to the understanding stated in your letter dated April 5, 2001, "that should Millennium's project be significantly changed as a result of the federal environmental review process, a new consistency review may be necessary." Millennium concurs with that procedure.*³²

Millennium agreed and understood that project changes could trigger additional consistency review requirements. It is disingenuous for Millennium now to disavow its previous agreement with NYSDOS to accommodate supplemental consistency reviews in the event of project changes. This is especially true here given that one such project change was Millennium's eleventh hour revelation of blasting in the Haverstraw Bay.

Millennium contends that "the potential need for limited blasting" in Haverstraw Bay was not a "project change" warranting a unilateral stop on the review timeclock. Millennium argues that NYSDOS, which first learned of the need for blasting on November 27, 2001, had ample time to issue a decision within the 60-day deadline. According to Millennium, the 60-day deadline expired on December 4.³³ That would have left NYSDOS only six days to review the

³¹ Typically, New York consistency reviews begin upon receipt of the FEIS. However, NYSDOS agreed to commence the consistency review early on March 12, 2001, the date FERC published the Supplemental Draft Environmental Impact Statement ("SDEIS"). This indicates that NYSDOS had no intention of "dragging out" its investigation.

³² Letter from Thomas S. West, LeBoeuf, Lamb, *et al.* (representing Millennium) to William Barton, NYSDOS, at 2 (Apr. 17, 2001).

³³ Millennium Initial Brief at 17.

impact of blasting. Millennium's attempt to characterize the blasting as an insignificant and previously disclosed matter contradicts the unanimous reaction by FERC and other agencies that blasting in Haverstraw Bay had not been addressed in the FEIS or any other environmental review documentation, that this was a significant change in the project, and that Millennium would be required not only to develop a blasting plan and impact assessment, but also to reopen consultations with NMFS.

The FEIS, which was published and received by NYSDOS on October 5, 2001, states that "[a]s proposed, the pipeline would be installed across . the Hudson River using an open-cut, lay-barge dredge construction method," which would involve excavation of the trench, installing the pipe, and backfilling.³⁴ There is no reference to the need for underwater blasting within Haverstraw Bay or its impacts on natural resources. On October 10, 2001, five days after issuance of the FEIS, in a submittal of documents to ACOE, Millennium indicated that underwater blasting may be necessary within Haverstraw Bay for roughly 400 feet of the easternmost segment of the pipeline trench. NYSDOS states that Millennium never informed NYSDOS of this change, and that it was only via correspondence with ACOE on November 27, 2001, that NYSDOS learned of the need to conduct blasting in the Significant Habitat.³⁵

Millennium initially claimed that no additional review of the environmental impacts of blasting were necessary, as this matter had been "fully disclosed" and "adequately addressed in the FEIS."³⁶ The subsequent response by FERC, however, indicates that this characterization

³⁴ FEIS at 2-22.

³⁵ NYSDOS Initial Brief at 9.

³⁶ Letter from Frederic G. Berner, Jr., Sidley, Austin, *et al.* (Millennium's counsel) to FERC Commissioners (Dec. 17, 2001).

was incorrect. In its Interim Order, FERC declared that this was “new information” requiring a formal modification of the Hudson River crossing work plan and the re-opening of formal consultations with NMFS.³⁷ Importantly for the purposes of this appeal, FERC also noted that “[t]he potential blasting will also effect the ongoing permitting processes for the COE . . . and the New York State Department of State (NYSDOS).”³⁸ More recently, FERC also required Millennium to submit additional data on blasting to the New York State Department of Environmental Conservation (“NYSDEC”) and obtain an amended Clean Water Act Section 401 water quality certification.³⁹ Millennium’s last minute disclosure of the need to blast in the Haverstraw Bay was a *major* project change that fundamentally altered the nature of the proposed action, the scale of its potential impacts to the significant habitat, and the consistency review by NYSDOS. Millennium did not submit its blasting plan or blasting impact assessment to NYSDOS to complete its consistency review until April 23, 2002 -- more than seven months after the FEIS was issued. On May 9, 2002, a mere 16 days after receipt of this information, NYSDOS promptly completed its review and issued its Objection.

As prior consistency appeals decisions have noted, the Secretary “must consider whether it is equitable to decide this appeal solely on the threshold issue. . . .”⁴⁰ The equities in this case do not favor rendering a decision based solely upon the narrow threshold issue of timing. In light of the extended and complex nature of the underlying proceedings, the long history of the

³⁷ *Millennium Pipeline Co., L.P.*, 97 FERC ¶ 61,292 at 62,332 (2001) (“Interim Order”).

³⁸ *Id.*

³⁹ *Millennium Pipeline Co., L.P.*, 100 FERC ¶ 61,277 at 62,166 (2002) (“Final Order”).

⁴⁰ *Amoco Prod. Co.*, 1990 NOAA LEXIS 49 at *31 (July 20, 1990) (declining to override a state objection as a threshold matter notwithstanding allegations of state misconduct).

parties' mutual dealings, the multiple changes in routes and, above all, the far-reaching implications of the Secretary's ultimate decision for the public and for the environment, the equities in this case weigh strongly against a summary dismissal on the basis of an alleged procedural technicality.

In sum, Millennium not only agreed to, but also by its own acts and omissions contributed to, the timing of the consistency review process. Because NYSDOS issued its decision in a timely fashion, the Secretary must dismiss Millennium's request for a procedural override.

III. Ground I -- The Secretary Should Uphold The NYSDOS Objection Because The Millennium Pipeline Is Not Consistent With The Objectives Or Purposes Of The CZMA.

Millennium demands that the Secretary override the NYSDOS Objection on the basis of Ground I, claiming that the pipeline is "consistent with the objectives of the CZMA."⁴¹ To satisfy the requirements of Ground I, Millennium must establish the following three elements: (1) "The activity furthers the national interest as articulated in § 302 or § 303 of the Act, in a significant or substantial manner" ("Element 1"); (2) "The national interest furthered by the activity outweighs the activity's adverse coastal effects, when those effects are considered separately or cumulatively" ("Element 2"); and (3) "There is no reasonable alternative available which would permit the activity to be conducted in a manner consistent with the enforceable policies of the [state's coastal] management program" ("Element 3").⁴² As detailed below,

⁴¹ Millennium Initial Brief at 19.

⁴² 15 C.F.R. § 930.121 (2002).

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⁴¹ Millennium Initial Brief at 19

⁴² 15 C.F.R. § 930.121 (2002).